MEMORANDUM AND ORDER—Entered June 17, 1963.

This action was commenced December 11, 1959, by the plaintiffs, Hugh D. Blanchard and Cullen Jenkins, partners doing business as Blanchard & Jenkins Construction Company, against Terry & Wright, Inc., and Federal Insurance Company as defendants.

The complaint alleged that defendant Terry & Wright, Inc., was a corporation created under the laws of the State of Michigan, and that defendant Federal Insurance Company was a corporation created under the laws of the State of New York and was a citizen and resident of that state. No reference to Section 1332 of Title 28, United States Code, was made in the complaint although it is apparent that the source of jurisdiction was thought to be in that section as diversity of citizenship and the requisite amount in controversy were alleged. The averments as to diversity failed to allege that the principal place of business of each of the defendants was not in the State of Kentucky. The complaint alleged that defendant Terry & Wright, Inc., had contracted with the United States to build a dam and spillway on the Rough River in the Western District of Kentucky and that defendant Federal Insurance Company, as surety for Terry & Wright, Inc., had executed a bond guaranteeing the performance of the contract by the principal in the bond and guaranteeing payment by the principal for all claims of labor and material used in that contract. It was then alleged that the plaintiffs, Blanchard and Jenkins, contracted with Terry & Wright, Inc., to furnish all filter material in accordance with the prime contract between Terry & Wright, Inc., and the United States.

Defendant Terry & Wright, Inc., admitted the averments of the complaint, except to deny that the plaintiffs had furnished a certain quantity of filter material for

which Terry & Wright, Inc., had failed to pay in full, denied the allegations as to the defendants' indebtedness for equipment that plaintiffs rented to Terry & Wright, Inc., and pleaded a settlement in Accord and Satisfaction of all matters arising out of the subcontract and its execution.

The case came on for trial to a jury on November 21, 1962, which resulted in a verdict for the plaintiffs and judgment was entered for the amount of the verdict on November 23, 1962. November 28, 1962, the defendants moved for a judgment notwithstanding the verdict, in accordance with their motion made at the conclusion of the introduction of all the testimony at the trial, and that motion was overruled March 6, 1963. On March 8, 1963, the defendants moved the Court to dismiss the proceeding for lack of jurisdiction and March 15, 1963, filed a motion to set aside the judgment for want of jurisdiction. The plaintiffs then moved the Court for leave to amend the complaint, asserting that the action arose under the Miller Act, Section 270b of Title 40, and under Section 1352 of Title 28, United States Code.

In their original answer the defendants denied that the Court had jurisdiction of this action and at the trial introduced testimony, not denied, that Terry & Wright, Inc., was a corporation created under the laws of the State of Michigan but had its only and chief place of business in the Western District of Kentucky, which was also the residence of the plaintiffs.

There was no diversity of citizenship between the plaintiffs and defendant Terry & Wright, Inc., as required by Section 1332 of Title 28 and, the complaint having failed to allege that the Federal Insurance Company did not have its principal place of business in the State of Kentucky, there was presumptively no diversity of citizenship there.

Bell v. Gray, DC Ky., 191 F. Supp. 328 (1960), affirmed 6 Cir., 287 F. 2d 410 (1960).

If jurisdiction is absent, the judgment is void. The validity of the judgment in this case depends upon whether jurisdiction on other grounds exists.

The amended complaint tendered by the plaintiffs on April 19, 1963, alleges that the action arises under the provisions of Sections 270a, 270b, and 270c of Title 40, United States Code, and that it was brought pursuant to those sections and Section 1352 of Title 28, United States Code, for the recovery of monies due plaintiffs for labor and material furnished by them in the prosecution of public work of the United States pursuant to the defendants' contract with the United States Army Corps of Engineers, which contract was to be performed within the area of this Court's jurisdiction. Plaintiffs seek to amend by making the United States of America, for the use and benefit of Blanchard and Jenkins, a plaintiff. The plaintiffs further allege that the action was instituted within one year next after the date of final settlement of the contract.

Section 270a of Title 40 requires that before any contract, exceeding $2,000.00 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, there shall be executed by such person a performance bond for the protection of the United States and a payment bond for the protection of all persons supplying labor and material in the prosecution of the work covered by the contract.

Section 270b (b) of Title 40 is as follows:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed **and not elsewhere**, irrespective of the amount

> in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit." (Emphasis added.)

The original complaint contained averments of facts sufficient for a proper foundation for the amendment tendered April 10, 1963. The United States as plaintiff for the use and benefit of the plaintiffs Blanchard and Jenkins is a mere nominal or formal party. United States to Use and Benefit of Platten v. Bush Const. Co., D. C. Mich., 109 F. Supp. 378, 380 (1953). Especially is this true in view of the provision of Section 270b (b) limiting the jurisdiction of a suit brought under the Miller Act to the United States District Court for the district wherein the contract was to be performed and not elsewhere.

The Miller Act and its predecessors have received liberal construction. In Baglin v. Title Guaranty & Surety Co., 166 F. 356, affirmed 3 Cir., 178 F. 682 (1909), the trial court permitted an amendment inserting averments concerning citizenship and party plaintiff. At page 361 of the opinion, the trial court said:

> "The defendant denies all liability upon several grounds. First, it is urged that Baglin is only a nominal party, the real interest residing in Heinze, and that it nowhere appears, either on the record or in the notes of testimony, that Heinze possesses the requisite citizenship to give jurisdiction to the Circuit Court. Without stopping to discuss this point, and merely for present purposes assuming it to be well taken, it is a defect that may be remedied by amendment after a trial on the merits, and permission is

hereby given to amend the record within 10 days by marking the suit and the various papers in the cause 'to the use of F. A. Heinze,' and by inserting the proper averments concerning his citizenship."

In United States v. Barrett, 135 F. 189 (1905), the court said that the failure to sue in the name of the United States as plaintiff is "at the worst, a mere formal irregularity, and should not affect either the jurisdiction of the court or the merits of the controversy." It was there held that the United States was merely a modal, formal, and nominal party, and this was said under a predecessor statute to the Miller Act which did not require the action to be filed in the United States District Court in the district where the work was to be performed as does the Miller Act.

In Burrell v. United States, 9 Cir., 147 F. 44 (1906), the court said, "The United States are neither the legal nor equitable plaintiffs in the present action."

The exclusive jurisdiction under the Miller Act is shown in the case of United States v. Aetna Casualty & Surety Company, 2 Cir., 297 F. 2d 665 (1962).

Amendments have been permitted which are comparable to the one tendered in this case, both with respect to the timeliness in which they were offered and the change sought in the nature of the action. In N. Y. Cent. R. R. v. Kinney, 260 U. S. 340 (1922), the jurisdiction of the action was permitted to be changed from an action at common law to an action under the Federal Employers' Liability Act by an amendment and the amendment was allowed after the statute of limitations had run. In International Ladies' Garment W. U. v. Donnelly G. Co., 8 Cir., 121 F. 2d 561 (1941), the court indicated it would approve the trial court's allowance of an amendment changing the theory of

recovery from one under the Sherman Act to an action at common law.

In enacting Section 1653 of Title 28, United States Code, which provides that defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts, it was the intention of Congress to permit amendment liberally to avoid dismissal of suits on technical grounds. Moore v. Conte Co., 3 Cir., 270 F. 2d 440 (1959).

For this Court to nullify the efforts and expense of the plaintiffs and defendants which culminated in the judgment based upon the verdict of the jury in this action would be substituting form for substance.

Plaintiffs' motion for leave to amend the complaint is sustained and the third amended complaint tendered with said motion on April 10, 1968, is hereby ordered filed.

Defendant's motion to dismiss this action for want of jurisdiction filed March 8, 1965, and the motion to set aside the judgment for want of jurisdiction filed March 16, 1965, are each and both hereby overruled.

/s/ Roy M. Shelbourne
June 13, 1968 United States District Judge

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No. 15504

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

HUGH D. BLANCHARD and CULLEN JENKINS, d b a Blanchard & Jenkins,

Plaintiffs-Appellees

v.

TERRY & WRIGHT, INC. and FEDERAL INSURANCE COMPANY,

Defendants-Appellants.

APPEAL from District Court of United States, for the Western District of Kentucky, Louisville Division.

OPINION – Decided May 11, 1964 and Filed May 11, 1964.

Before: WELCK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

WELCK, Chief Judge. The complaint was filed in the District Court by a materialman against the principal contractor and his surety to recover for materials and the rental value of equipment in the amount of $51,180.11, furnished the contractor in connection with the performance of his contract with the United States for the construction of a dam and spillway at the Rough River Reservation in Grayson County, Kentucky.

The complaint alleged diversity of citizenship of the plaintiffs and the corporate defendants, but did not state where the principal place of business of either of the defendants was located.

After the lapse of several years, the case came on for trial on its merits before a jury which returned a verdict

in favor of plaintiffs for $17,899.92. Judgment was entered thereon on November 23, 1962. The court denied defendants' timely motion for judgment notwithstanding the verdict on March 6, 1963. On June 17, 1963 the court denied defendants' motion to vacate and set aside the judgment and to dismiss the case for lack of jurisdiction. In this motion to vacate defendants asserted for the first time that the principal place of business of the contractor was Kentucky, which was the plaintiffs' place of residence;[1] that no allegation was made in the complaint as to the principal place of business of the surety which was a foreign corporation. Defendants claimed that there was a presumption of no diversity of citizenship citing *Bell* v. *Gray*, 191 F. Supp. 328, affirmed 287 F. 2d 410 (CA 6). The *Bell* case, however, does not support the proposition for which it was cited.

On April 10, 1963, during the pendency of defendants' motions to vacate and dismiss, plaintiffs filed a motion for leave to file their third amended complaint to specifically invoke jurisdiction under the Miller Act (40 U.S.C. 270 a, b & c) and to change the plaintiffs' part of the caption of the case so that it would read:

> "United States of America for the use and benefit of Hugh D. Blanchard & Cullen Jenkins d b a Blanchard and Jenkins Construction Company,
>
> *Plaintiffs*,
>
> v.
>
> Terry & Wright, Inc., and Federal Insurance Company,
>
> *Defendants*."

[1] Testimony at the trial disclosed that the principal place of business of Terry & Wright, Inc. was in Kentucky.

Opinion

The third amended complaint, tendered for filing with the motion for leave to file, did not change in any respect the substantive allegations setting forth plaintiffs' claim. The court granted the motion for leave to file the third amended complaint on June 17, 1963, and on the same day denied defendants' motions to vacate and dismiss. Defendants appealed from the order denying their motions to vacate and set aside the judgment and dismiss the complaint, and granting plaintiffs leave to amend.

The argument of appellants was that the complaint did not allege nor did the evidence prove diversity jurisdiction and that the judgment was therefore void for lack of jurisdiction. Appellants further contended that the court had no jurisdiction to grant plaintiffs leave to file their third amended complaint and that they can raise the jurisdictional question at any time.

We think that the broad allegations of the complaint were sufficient to confer jurisdiction upon the District Court. Diversity of citizenship and amount were alleged although the principal offices of the defendants were not specifically set forth. It was not claimed here that the principal office of Federal Insurance Company was in Kentucky. If Terry & Wright, Inc. were dismissed from the case there would then be no question that even diversity jurisdiction existed. Appellees are willing to dismiss this defendant if the Court finds it necessary to establish jurisdiction. We think jurisdiction exists even though said defendant remains in the case. More important than the allegations in the complaint concerning diversity of citizenship were the allegations that the contract for the construction of the dam and spillway was with the United States, and that the bond was executed to guarantee the performance of that contract and the payment of all bills for labor and material furnished in connection therewith

In our opinion, these general allegations were sufficient to invoke jurisdiction under the Miller Act without the necessity of referring to the Act by name.

It is true that the name of the United States does not appear in the caption of the complaint, but the caption is not regarded as containing any part of plaintiffs' claim. We must look to the allegations of the complaint in order to determine the nature of plaintiffs' cause of action. *State of Ohio, ex rel. Senea* v. *Swift & Co.*, 270 Fed. 141, 147 (CA 6). There it clearly appears to be a claim cognizable under the Miller Act.

Exclusive jurisdiction in the District Court was expressly conferred by the Miller Act. *United States* v. *Aetna Casualty & Surety Co.*, 297 F. 2d 665 (CA 2). District Courts also have concurrent jurisdiction with the state courts of any action on a bond executed under any law of the United States. 28 U.S.C. 1352. *Continental Casualty Co.* v. *United States*, 305 F. 2d 794 (CA 8); *United States* v. *Aetna Casualty & Surety Co.*, supra. Even though the allegations of the original complaint with respect to jurisdiction of the court were defective, the trial or appellate court had full power to correct them. 28 U.S.C. 1653; *Stern* v. *Beer*, 200 F. 2d 793 (CA 6); *Chicago Stadium Corporation* v. *State of Indiana*, 220 F. 2d 797 (CA 7). Cf. *Moore* v. *Coats Company*, 270 F. 2d 410 (CA 3).

We do not follow the argument that the court had no jurisdiction to grant the amendment. The case was pending in the District Court at the time on defendants' motions to vacate and set aside the judgment and dismiss the complaint for the very defects in the complaint which the amendment permitted by the court corrected. If the court had jurisdiction to pass upon defendants' motions, we can see no reason why the court could not remedy the technical defects of which they were complaining.

Opinion

The third amended complaint did not change the nature of plaintiffs' claim which was to recover for supplies sold to a contractor who had furnished bond under the Miller Act.

In our judgment, the failure to name the United States as a party for the use and benefit of the plaintiffs in the original complaint did not prejudice either the United States or the defendants. Plaintiffs could have named the United States as a party plaintiff without its knowledge or consent. The United States would have had no control over the litigation. The use plaintiffs would be represented by their own lawyers and not by any representative of the Department of Justice. The United States would not be liable for court costs. The claim set forth in the complaint as well as the judgment belonged to the use plaintiffs and not the United States.

We regard the failure to name the United States a party plaintiff in the original complaint at most a formal irregularity, which ought not to affect the jurisdiction of the District Court. *Hendrix Corp. v. American Dredging Co.*, 318 F. 2d 299 (4 A 5). This irregularity was cured by the amendment permitted by the court.

The interest of the United States was merely nominal. *Equitable Surety Co. v. United States, to the use of Miller*, 234 U. S. 443, 457. The use plaintiffs were the real parties in interest.

We find no error in the District Court in denying appellants' motions to set aside the judgment and dismiss the complaint or abuse of discretion in granting leave to file the third amended complaint.

Judgment affirmed.

CAUSE ARGUED AND SUBMITTED—April 4, 1964.

Before: WEICK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

This cause is argued by John P. Sandidge for defendants-appellants and by Edgar A. Zingman for plaintiffs-appellees and is submitted to the Court.

JUDGMENT—Filed May 11, 1964.

Appeal from the United States District Court for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees recover from defendants-appellants the costs on appeal, as itemized below and that execution therefor issue out of said District Court.

Aproved for entry:

(s) Paul C. Weick,

Chief Judge.

STATUTES AND RULES CITED

40 U. S. C. A. 270a

Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. Aug. 24, 1935, c. 642, § 1, 49 Stat. 793.

40 U. S. C. A. 270b (a)

Same; rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said con-

tractor within ninety days from the date on which such person did or performed the last of the labor or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

40 U. S. C. A. 270c

Same; right of person furnishing labor or material to copy of bond

The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof. Aug. 24, 1935, c. 642 § 3, 49 Stat. 794.

28 U. S. C. A. 2107

Time for appeal to court of appeals

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree. . . .

Rule 60, Federal Rules of Civil Procedure

Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a

prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, #1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 15 (a and b) Federal Rules of Civil Procedure

Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an

amended pleading within ten days after service of the motion to the original pleading or within ten days after service of the amended pleading, whichever period is the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) U. S. C. A. Rules of Federal Rules of Civil Procedure.

Unaffected by Expiration of Term. The power of time providing for the doing of an act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.